

Telephone (609) 757-5312

DATE: October 25, 1994

CASE NO: 94-STA-7

Aaron N. Williams,
Complainant

v.

Carretta Trucking, Inc.
Respondent

Appearances:

Andrew F. Erba, Esquire
For Complainant

Steven I. Adler, Esquire
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act, hereinafter the "Act", 49 U.S.C. app. §2305 (1982); which prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities.

Complainant filed his complaint on July 14, 1993, and on October 26, 1993, the Occupational Safety and Health Administration of the U. S. Department of Labor issued its investigative findings to the effect that the complaint had no merit (ALJ 1).¹

Complainant requested a hearing on November 6, 1993 (ALJ 2), and an initial notice of hearing was issued on November 24, 1993

¹ References to the record are: "ALJ" - Administrative Law Judge exhibits; "CX" - Complainant's exhibits; "RX" - Respondent's exhibits; "Tr" - transcript of trial.

(ALJ 3) upon the November 23, 1993 assignment of this case to the undersigned. After several continuances (ALJ 5, 9, 14), the matter was tried on June 2 and 6, 1994. Initial briefs were filed by September 16, 1994, with reply briefs finally filed by October 12, 1994.

THE LAW

29 U.S.C. §2305. Protection of employees

(a) Prohibition against the discharge, discipline, or discrimination for filing complaint or instituting proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, etc.

No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or other, or has testified or is about to testify in any such proceeding.

(b) Prohibition against discharge, discipline, or discrimination for refusal to operate vehicle in violation of Federal rule, regulation, etc., or because of apprehension of serious injury due to unsafe condition; reasonable person standard

No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.

COMPLAINANT'S CASE

Complainant argues that Respondent violated both sections (a) and (b) of the Act in discharging him from its employ on July 13, 1993. He seeks an award for back wages (Tr. 24).

Complainant, a tractor-trailer driver, alleges that his first driving experience on Respondent's behalf² consisted of the constant breakdown and failure of critical mechanical (and other) elements of the truck assigned to him for transport. He ultimately made oral complaints regarding this experience and expressed his concern over the safety of equipment to various of Respondent's management employees.³ He asked that he be assigned to drive what his experience indicated to be the safer "Freightliner" tractors, and noted that he would take any "Peterbilt" vehicle assigned to him to a Department of Transportation (DOT) weight station to be inspected (Tr. 127).

Moreover, Complainant alleges that the two tractors ultimately offered to him for driving assignments⁴ were unsafe to drive (and, in fact, in the repair shop for service, CX 24-25), and thus potentially presented a safety hazard to himself and the public, proving that his operation of either of these vehicles would have been a violation of federal safety regulations.

In sum, Complainant alleges that he was terminated from Respondent's employ because he made the foregoing complaints and because he refused to drive the unsafe vehicles, all in violation of sections (a) and (b) of the Act (Tr. 123-134).

THE DEFENSE

Respondent argues that it discharged Complainant for his refusal to accept a work assignment (Tr. 24-36), and because he lied to its management by stating that he never was given that work assignment (Resp. Br. at 10).

According to Respondent, near the end of June, 1993, Complainant was assigned to team up with another driver trainee to go to its facility located in Forest City, North Carolina (Tr. 63, 64). Complainant was instructed to pick up another tractor at the Forest City facility for his use, and to drive a load to Albany, New York. However, due to a death in Complainant's

² From Forest City, North Carolina, to Respondent's Paramus, New Jersey facility, in a "Peterbilt" tractor (Tr. 70-98).

³ Hector Hernandez, Denise Schipper, Jim Simmons, and Ken Godek. (Tr. 99-132).

⁴ "Peterbilts" numbered 89-027 and 89-173.

family, he only drove the load to Paramus, New Jersey. The tractor that was assigned to Complainant at that time was a Peterbilt tractor, No. 89168. (Tr. 70, 84, 97-98). Moreover, despite Complainant's allegation that he had several problems with the tractor assigned to him during his trip to Paramus, New Jersey, he conceded at the hearing that the events in North Carolina are irrelevant to his claim. (Tr. 273). Complainant did, in fact, drive the tractor safely to his destination. (Tr. 97-99 and 288). Additionally, during his trip from Forest City, North Carolina to Paramus, New Jersey, Complainant neither refused to drive tractor No. 89168 nor did Respondent refuse to make any vital repairs to the tractor as requested by him. (Tr. 84-98). Furthermore, during his trip to Paramus, New Jersey, Complainant passed several DOT weigh stations along the way which could have inspected the tractor to determine whether it met DOT standards. However, Complainant did not get the tractor inspected, despite his allegation that the tractor was unsafe. (Tr. 284-86). Approximately a week later, on July 12, 1993, Complainant showed up at the Respondent's Paramus, New Jersey facility unannounced contrary to Respondent's practice of calling drivers to report for work. (Tr. 99 and 253-54). Despite Complainant's not being scheduled to come to work on that day, Hernandez⁵ accommodated his request for work by presenting him with a choice of two tractors to utilize. Both tractors were Peterbilt tractors, Nos. 89173 and 89027. (Tr. 235-37; CX 26, 27). Although Complainant was given the choice to select either tractor, he refused to drive either one (CX 26, 27). Moreover, he did not perform a pre-trip inspection on either tractor. (Tr. 236-248). Also, he did not review the Vehicle Condition Report (VCR) for either of the tractors assigned to him by Hernandez. (Tr. 258-259). Respondent asserts therefore that Complainant had no knowledge concerning whether there were any safety problems with either of the two tractors that were offered to him. Complainant had informed Hernandez that "I'm not driving no Peterbilt because they are pieces of junk." (Tr. 237), and Respondent insists that he had no specific knowledge concerning the condition of either vehicle and simply wanted to drive a more desirable Freightliner tractor. Notwithstanding his refusal to accept an assignment on July 12, 1993, Complainant renewed his effort on July 13 to obtain a Freightliner. On July 13, 1993, Hernandez again assigned Complainant a tractor, No. 89027. That tractor was a Peterbilt and one of the two tractors that had been assigned to Complainant the day before and which had not gone out due to his refusal to drive same. (Cx 26). Complainant again refused to accept the assigned tractor and did not perform a pre-trip inspection on it. Therefore, per Respondent, he again had no knowledge of the vehicle's condition. On July 13, 1993, Hernandez referred Complainant to Denise Schipper (Tr. 263) who was the Fleet Manager to whom Hernandez reported (Tr. 173).

⁵ Respondent's Driver Manager.

During Complainant's conversation with Schipper, which was tape-recorded by Complainant (CX 15, 16), Complainant demanded a Freightliner tractor (Tr 117). Schipper referred Complainant to Kenneth Godek, Director of Human Resources for Respondent (Tr. 120). Later that day, Complainant met with both Godek and James Simmons⁶ to discuss his concerns. During their conversation, Complainant demanded that he be assigned a vehicle that would pass DOT inspection. (Tr. 123). He also advised that he was not assigned a tractor when, in fact, Hernandez on both July 12 and July 13 assigned him tractors. (Tr. 128 and 189). After this meeting, Simmons became aware that Hernandez assigned Complainant tractors on both July 12 and July 13. It was at that point in time that Simmons terminated Complainant. (Tr. 194-95).

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

I find, on this record, that there is precious little, if any, evidence of a violation of section (a) of the Act, and an abundance of evidence that there was no violation of section (b) of the Act.

SECTION 2305(a)

For purposes of this determination, without the benefit of research in respect thereof, I will accept Complainant's proposal (Compl's Br. 2-8) that Complainant's internal safety complaints to management⁷ constitute protected activity for purposes of 29 U.S.C. §2305(a). Moreover, there is no question that temporal proximity of adverse employment action to any such complaint compels a very close look at (i.e., raises a red flag with respect to) the motivation behind such action.

I find, therefore, that Complainant's internal complaints to Respondent's management relative to his concern for the safety of its equipment merit the status of protected activity under the Act. I find also that Respondent discharged Complainant within a relatively short period of time from the making of his complaints.

However, the circumstantial evidence from which Complainant asks me to draw the inference of retaliation is scant at best. That Hernandez failed to advise Complainant that his refusal to pre-trip the tractors identified was ultimately to be construed as a refusal to accept a work assignment, i.e., a violation of company policy and presumably a dischargeable offense, is a non-

⁶ Respondent's Director of Operations.

⁷ In addition to his threat to management to bring any assigned tractor for immediate DOT inspection.

event in my view. Hernandez was admittedly attempting to accommodate Complainant with a "Freightliner" truck, and had no apparent reason to warn or threaten Complainant of possible adverse employment action. The evidence suggests only that Hernandez's job was to assign work, not to take measures to discipline employees, offer them advice, or keep them "in line." Complainant's assertion that Hernandez did not advise his superior of Complainant's refusal to accept the work assignment⁸ is belied by the record (Tr. 235). Furthermore, I find the differences between Hernandez's handwritten statement (CX 27) and the later typed version (CX 26) to have been adequately and credibly explained (Tr. 236-241). Finally, Complainant's proposal that because Respondent's management may have had no knowledge of the actual condition of the tractors assigned to Complainant, there existed no "...basis to assert that [these tractors] would have passed a pre-trip inspection" (Complt's Br., 14), is, in my view, neither relevant nor probative on the question of retaliatory discharge. This, because Respondent's basis for the subject discharge was not that Complainant refused to accept a work assignment to drive a pre-trip passable tractor, but that Complainant refused simply to accept a work assignment. Whether Respondent knowingly offered to Complainant a pre-trip passable tractor has no bearing on the issue whether Complainant refused a work assignment.⁹

Insofar as Section (a) is concerned, this record is devoid of evidence permitting the inference that Complainant was discharged because he expressed safety complaints. We are left only with the asserted unproven, generalized suspicion of employer animus to any complaining employee, which falls far short of establishing a case for retaliatory discharge under the Act.

SECTION 2305(b)

To establish a violation of Section (b) of the Act, Complainant must show that he was discharged because he refused to operate a vehicle when such operation would constitute a violation of Federal safety rules, or because of his "...reasonable apprehension of serious injury to himself or the

⁸ Suggesting that only a minor infraction of company rules had occurred with such refusal, thus rendering Respondent's alleged reason for discharge pretextual.

⁹ I find also that Complainant has failed to establish by competent evidence that the offered tractors were in the repair shop when offered (see CX 24, 25; Tr. 155, 156). Counsel's speculative interpretation of the notations, dates, etc. appearing on CX 24 and CX 25, is not evidence. See ftn.¹¹, infra.

public due to the unsafe condition of such equipment." Further, in order to qualify for relief under this section, "...the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition" (The Law, supra).

As Complainant admittedly was unaware of the condition of the tractors offered to him for work assignment (Tr. 236-248, 258-259)¹⁰, his operation of these tractors could not be said to have constituted a violation of Federal safety rules.¹¹

Moreover, for the same reason, I find that Complainant could not have harbored a "...reasonable apprehension of serious injury..." (emphasis added) within the meaning of the Act, since he admitted that not all "Peterbilt" tractors were unsafe, and that only a pre-trip inspection of a given tractor would determine its condition relative to safety worthiness (Tr. 247-248). In my judgment, absent the pre-trip inspection, there existed no "...unsafe condition[s]...of such nature that..." Complainant could reasonably have"...conclude[d] that there [was] a bona fide danger of an accident...resulting from the unsafe condition." Section 2305(b).

Finally, Complainant fails to qualify under Section 2305(b) because he did (could) not seek from Respondent - and was not unable (could not be unable) to obtain, correction of the unsafe condition. No such condition was presented to Respondent for correction, as no such condition was ever identified.

I also find on this record as a whole, that Respondent dismissed Complainant for appropriate non-pretextual reasons, i.e., because of his failure to accept a work assignment and because of his unqualified denial that such assignment was made.

¹⁰ He did not visually inspect, pre-trip inspect, or examine the VCRs of, the subject tractors.

¹¹ I note that I declined to grant Respondent's motion to dismiss at trial upon Complainant's presentment of CX 24 and 25 which suggested that the offered tractors were in something other than drivable condition i.e., in the repair shop (Tr. 135-156). Had Complainant been able to establish this fact (see ftn.⁹ supra), as well as his then knowledge of same, my finding on this aspect of his Section 2305(b) claim may have been different. Furthermore, the establishment of this fact may have impacted upon my finding (infra) of non-pretextual discharge. That is, if the subject tractors were knowingly not available for assignment, then Respondent presumably could not have assigned work to Complainant, who, in turn could not have refused a work assignment. Respondent, it could then be argued, could not have dismissed Complainant for this reason.

In summary, I find that Complainant has failed to make out a case of retaliatory discharge under Section 2305(a) or (b). As I see it, the Act effectively authorizes an employee to refuse, with impunity, to drive an unsafe vehicle. The Act also authorizes an employee to complain, with impunity, to his employer and/or appropriate government authorities about his safety concerns. The Act does not, however, authorize an employee to demand a particular type of vehicle for work assignment, which type vehicle, in his view, would more likely be safe consonant with his limited experience. The Act will not protect or sanction employee action (nor prohibit adverse employment consequences with respect thereto), where such action violates rational employer policy requiring the mandatory acceptance of a work assignment unless employee pre-operation inspection of a vehicle discloses unsafe vehicle conditions.

ORDER

On the basis of the foregoing, I recommend this matter be **DISMISSED**.

RALPH A. ROMANO
Administrative Law Judge

Dated:
Camden, New Jersey